

[ORIGINAL CIVIL JURISDICTION]

PEDLOW, J.

January 13, 1940.

S.P.M. RAMANATHAN CHETTIAR

v.

M.P.L.M. MUTHIAH CHETTIAR & OTHERS.

[MALACCA CONSOLIDATED SUITS
Nos. 24 and 25 of 1937]

*Default judgment—solicitor still on the record—
whether still representing client or not.*

In an account case in Malacca a client on the 16th February 1938 wrote to his then solicitor informing him that he did not wish his said solicitor to act for him any longer and that his authority to act for his client had been terminated and that the solicitor was no longer to agree to anything on behalf of the client. No action however was taken under Order 7 rule 3 re change of solicitor until the 11th March 1938.

On the 17th February 1938 there was an appointment in the proceedings before the Registrar to proceed with accounts and enquiries. The said solicitor attended on the appointment and informed both the Registrar and the said solicitors concerned that he no longer represented his former client or at any rate he informed them of the existence of the said letter. He, however, attended the enquiry as if his legal position was unaltered and as if he still represented his former clients. He initialled the draft Registrar's Certificate as seen. Further consideration of the matter came on before the Judge on the 9th March 1938 when judgment was given against the 1st and 2nd Defendants. The solicitor attended on that occasion and was recorded in the Judge's notes as appearing for the 1st and 2nd Defendants and he was similarly recorded in the Registrar's notes of the hearing as appearing for those Defendants and he initialled the draft judgment on the 11th March as seen. He did not nor did anyone else inform the Judge of the contents of his client's letter of the 16th February.

Held, that until the change of solicitor had been effected in accordance with the provisions of Order 7 rule 3 the solicitor continued to represent the first defendant and that the mere writing of the letter of the 16th February 1938 was of no legal effect so far as the Court was concerned in the absence of the filing in Court of a notice under Order 7 rule 3 (3) or of action under Order 7 rule 3 (4) and accordingly the judgment was not a default judgment and could not be treated as such.

Cases referred to:—

- (1) *Petty v. Daniel*, (1887) 34 Ch. p. 172 at p. 180.
- (2) *Wilkins v. Bedford*, 35 L.T. 622.
- (3) *Schafer v. Blyth*, 1920, 3 K.B. 140.
- (4) *Tan Chew Wah v. Teo Kang Swee*, 1934 S.S.L.R. 297 at p. 300.
- (5) *Anlaby v. Praetorius* (1888) 20 Q.B.D. 764.

(6) *Hughes v. Justin*, 1894, 1 Q.B.D. 667.(7) *Armitage v. Parsons*, 1908, 2 K.B.D. at p. 414.(8) *Farden v. Richter*, (1889) 23 Q.B.D. at p. 129.

MOTIONS.

Roland Braddell for the Plaintiff.

Eber for 1st Defendant.

Pedlow, J.—Two motions are before the Court, one, No. 15, dated the 7th day of October, 1938, wherein the first defendant moves this Honourable Court for an order that the judgment of Horne J. herein dated the 9th March, 1938, may be set aside on the following grounds:—

- (a) that it is irregular in form;
- (b) that it was entered prematurely;
- (c) that the amount of judgment entered against the applicant is for an amount greater than that set out in the Registrar's Certificate herein dated the 28th day of February 1938.

In a judgment in this consolidated action dated the 12th August, 1937, Horne J. ordered *inter alia* that certain accounts be submitted to the Registrar who should issue his certificate. Accounts were filed on the 2nd February, 1938, an enquiry was held and the accounts were passed on the 17th February, 1938. The Registrar issued his certificate on the 28th February, 1938, and it was filed in Court on the 1st March, 1938. The matter was set down for further consideration before the Judge at the Assizes commencing at Malacca on the 2nd March, 1938, and on the 9th March, 1938, judgment was entered for the plaintiff against the first defendant for the sum of \$16,431.60 and against the 2nd defendant for the sum of \$11,060.94.

The other motion, No. S. 15, is filed on behalf of the plaintiff who asks that the figures of \$16,431.60 in the judgment of the 9th March, 1938, may be deleted and the figures of \$16,413.60 substituted therefor. The supporting affidavit makes it clear that owing to a clerical error the figures "3" and "1" got transposed resulting in judgment being entered for an excess of \$18/-. This clerical error is not disputed by the defendant and the motion, S. 15, is allowed and it is ordered that the rectification of the figures take place. The costs of the motion will be borne by the plaintiff.

The question of the correct order to be made on the first motion, No. 15, is a much more difficult one. The application is based on the three grounds set out above and, if the pleadings are to be strictly followed, it should be considered on these grounds alone—Order 63 rule 3; *Petty v. Daniel*,⁽¹⁾. But the main argument turned on an entirely different ground, viz. that the applicant, the first defendant, was not represented at the trial and that accordingly the judgment was a default judgment and therefore could be set aside by motion as opposed to an appeal or a fresh suit to set it aside.

The facts which are not disputed are that on the 16th February, 1938, the first defendant wrote to his solicitors, Messrs. Salt & Co., the following letter:—

“M.P.L.M. Muthiah Chettiar,
65, First Cross Street,
Malacca, 16th February 1938.

“Messrs. W. H. Salt & Co.,
Advocates and Solicitors,
Malacca.

Dear Sirs,

Suit Nos. 24 & 25 of 1937
Re S.P.M.R.M.

In reference to my interview with you of yesterday and this morning, I regret that we have not come to any agreement with you as regards your costs herein.

Since you are not willing to act for me any longer, will you please inform the other parties to these proceedings that your authority to act for me has been terminated and that you are no longer to agree to anything on my behalf.

Yours faithfully,

(Sgd.) Moona Pana Lana Moona Muthiah
Chettiar (in Tamil) 16-2-38.”

No action was, however, taken under Order 7 rule 3 re change of solicitors until the 11th March, 1938, i.e. two days after judgment had been signed. However, on the 17th February, at the enquiry before the Registrar, it would appear that Mr. Salt told the other solicitors present and the Registrar that he no longer represented the first and second defendants, or at any rate he informed them of the existence of the letter. He, however, attended the enquiry as if his legal position was unaltered. He initialled the draft Registrar's certificate as “seen”. He attended before the Judge at the further consideration of this matter on the 9th March and he is recorded in the Judge's notes as appearing for the first and second defendants. He

is similarly recorded in the Registrar's notes of the hearing as appearing for the first and second defendants and he initialled the draft judgment on the 11th March as “seen”. It seems obvious that at no time did he or anyone else inform the Judge of the contents of his client's letter of the 16th February. On these grounds Mr. Eber argued that his client, the first defendant, was not represented at any proceedings after the 16th February, 1938, and that, therefore, the judgment entered against the first defendant was entered in his absence.

I have been considerably puzzled as to what the exact legal position is as to the representation of the first defendant after the 16th February. I have been unable to find, and have not been referred to, any cases which covered the point exactly, but I hold that until a change of solicitor had been effected in accordance with the provisions of Order 7 rule 3 Mr. Salt continued to represent the first defendant and that the mere writing of the letter of the 16th February, 1938, set out above was of no legal effect, so far as the Court was concerned, in the absence of the filing in Court of the notice under Order 7 rule 3 (3) or of action under Order 7 rule 3 (4). Order 7 rule 3 (3) reads as follows:—

“Until such notice is filed, and a copy served on the opposite party, the former solicitor shall be deemed to be the solicitor of the party, and his address the address for service, until the final conclusion of the cause or matter, whether in the Court of first instance or on appeal.”

To hold otherwise would, I think, introduce an element of uncertainty into all legal proceedings and, therefore, I am of the opinion that the point cannot be decided by the application of the ordinary rules governing the relationship of principal and agent. Further one does not enter an appearance, for example, by merely instructing a solicitor to do so unless action is taken under O. 12 r. 2. I hold then that this judgment is not a default judgment.

In passing, however, I would remark that it seems to me that the counsel engaged in the case should have informed the Judge of the existence of the letter of the first defendant to his solicitor dated the 16th February, of the contents of which they were all aware and the Judge could then have considered what steps ought to be taken.

If I am wrong in holding that the judgment was not a default judgment for want of appearance at the

trial, it still follows that the judgment cannot be set aside under Order 34 rule 32 or Order 28 rule 15 because firstly lack of appearance is not one of the grounds on which the present motion is based, and secondly, if it were one of the grounds, the motion would still fail as being out of time. Order 34 rule 32 says that the application to set aside a judgment where one party does not appear at the trial shall be made within six days of the trial. The present application was brought seven months after the trial. This is clearly after too long a delay. In *Wilkins v. Bedford*,⁽²⁾ a delay of six months was held to be excessive and the application was refused. In *Schafer v. Blyth*,⁽³⁾ a delay of a few days only was approved of and the delay was excused on the ground that notice had been served on the other side within six days and that the Judge before whom the motion was to be brought, i.e. the trial Judge, was not sitting on the sixth day. It seems clear from these cases that, although it is stated that the Court in every case has a discretion to extend the time with a view to the avoidance of an injustice, the Court was not prepared to approve of any serious delay in making the application.

Default judgments are of three kinds: default of entering appearance; default of filing a defence; and default of appearing at the trial. Mr. Braddell admits that such default judgments may, in proper cases, be set aside by motion but argues that, as this is not a default judgment, the present proceedings are misconceived and do not lie. I am unable to agree.

Order 73 provides for setting aside proceedings for irregularities. The corresponding English order is No. LXX and it seems clear that applications may be made in England under this order by motion or by summons. In my opinion the same law applies here.

This brings me to the consideration of the three grounds of the motion.

The first is that the judgment is irregular in form in that it is worded "this suit coming on for trial" instead of "this suit coming on for further consideration." I do not think that there is any weight in this ground, the more especially as the plaintiff's letters dated the 23rd February to the other parties to the suit distinctly state that the consolidated suits have been put in the list "for further consideration."

The second ground is that the judgment was entered prematurely. It is true that the case was

brought on for further consideration before the expiry of the number of days on which the first defendant could have insisted, had he wished to do so, under the rules. I have already held that the first defendant was represented throughout the proceedings. It follows, therefore, that all parties waived their objections to the shortening of the time and consented to the case coming on the 9th March in order to get it disposed of whilst a Judge was present in Malacca at the current Assizes. If I am wrong as to this, I still think that this ground must fail because of the delay in bringing the present motion. The application has to be made within a reasonable time—Order 63 rule 2. I have already quoted the case of *Wilkins v. Bedford*, in which a delay of six months was held to be excessive. In *Tan Chew Wah v. Teo Kang Swee*,⁽⁴⁾ Gerahty J. held that a delay of one month and four days was excessive.

The third ground is that the judgment was entered for an amount greater by roughly \$700/- than the correct amount. The applicant in his affidavit in support of his motion does not deal at all with the three grounds on which his motion rests but confines himself to the question of his non-representation when judgment was entered. It is, therefore, not very clear just how the final figure was arrived at. It is true that it is not the exact figure which appears in the Registrar's certificate but I am unable to agree on the evidence before me that it was an incorrect figure. The difference may have been accounted for by the deduction of some items properly deducted—perhaps costs. In this connection I would point out that the head judgment of Horne J. dated the 12th August 1937, directs, *inter alia*, that the costs of all parties of and incidental to these proceedings be taxed as between solicitor and client and paid out of the assets of the said partnership. I am unable to say how the figure entered in the judgment was arrived at beyond that a certain sum was deducted, but it was obviously the figure of which the learned trial Judge approved, because his own notes read "judgment for the plaintiff against No. 1 defendant for \$16,431.60 (sic) and against the second defendant for \$11,060.94." I am unable to agree, as was urged by counsel for the applicant, that the Judge was bound to enter judgment for the amount mentioned in the Registrar's certificate and for no other sum.

Counsel for the first defendant relied very strongly on the two cases of *Anlaby v. Praetorius*⁽⁵⁾ and *Hughes v. Justin*,⁽⁶⁾ and asked that the present judg-

ment should be set aside *ex debito justitiae*. In *Armitage v. Parsons*,⁽⁷⁾ in the judgment of the learned President of the Appeal Court, Sir Gorell Barnes, there occurs a passage which so exactly expresses my own views with regard to the applicability of these cases to the present matter that I set it out in full:—

“It was argued before us for the defendant that the fact that the judgment was signed, not for the exact amount for which it should have been, but for a few shillings too much, entitles the defendant *ex debito justitiae* to have the judgment set aside; and for that proposition reliance was placed upon the cases of *Anlaby v. Praetorius* and *Hughes v. Justin*. In my view neither of these decisions applies to the circumstances of the present case. They were both cases in which the plaintiff had no right to judgment for any debt at all; in the first case because the time for putting in a defence had not expired when the judgment was signed, and in the other case because, while the writ was outstanding and before it had been served, the plaintiff and defendant met together and agreed upon an amount to be paid by the defendant in settlement of the whole matter, which was accordingly paid. Therefore there was no debt due in either case when the judgment was signed, and in the latter case there was only some trifling amount due for costs. I do not think either of those cases governs the present.”

There is one further point to which I would refer,

namely that the present motion is not supported by any affidavit of merits. It may be that such an affidavit is not strictly necessary but I would refer to the following passage, which I feel has some application to the present matter, in the judgment of Baron Huddleston in *Farden v. Richter*,⁽⁸⁾.

“The application to set it aside must be taken to have been met on the threshold by the objection that the defendant had not made any affidavit suggesting that he had a defence on the merits. During the argument I was inclined to doubt whether such an affidavit could be always necessary. But in *Smith v. Dobbins* the present Master of the Rolls appears to have stated that it was ‘an inflexible rule’ that a regular judgment properly signed could not be set aside without such an affidavit, and there are statements in the manuals of practice to much the same effect. The expression is perhaps strong, but, where there is no such affidavit, it is only natural that the Court should suspect that the object of the Applicant is to set up some mere technical case. At any rate, when such an application is not thus supported, it ought not to be granted except for some very sufficient reason.”

I hold that motion No. 15 of 1938 must be refused with costs.

Motion refused.

END OF STRAITS SETTLEMENTS OFFICIAL REPORTS.
